



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

2000 JUL -6 P 3:56

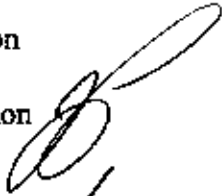
**AGENDA ITEM**

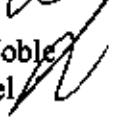
For Meeting of: 7-13-00


July 6, 2000

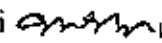
**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence M. Noble   
General Counsel

N. Bradley Litchfield   
Associate General Counsel

Michael G. Marinelli   
Staff Attorney

Subject: Draft AO 2000-12

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 13, 2000.

Attachment

1 ADVISORY OPINION 2000-12

2  
3 Robert F. Bauer  
4 Perkins Coie LLP  
5 607 14<sup>th</sup> Street, N.W. 8<sup>th</sup> Floor  
6 Washington, DC 20005

7  
8 Trevor Potter  
9 Wiley, Rein & Fielding  
10 1750 K Street, N.W. 7<sup>th</sup> Floor  
11 Washington, DC 20006

**DRAFT**

12  
13 Dear Mr. Bauer and Mr. Potter:

14  
15 This refers to your letter dated May 24, 2000, requesting an advisory opinion  
16 concerning the application of the Federal Election Campaign Act of 1971, as amended  
17 ("the Act"), the Presidential Primary Matching Payment Act ("the Matching Act") and  
18 Commission regulations to a proposal to use Federal funds to pay for certain expenses of  
19 now inactive Presidential candidates, former Senator Bill Bradley and Senator John  
20 McCain, including those of their campaign staff and volunteers to attend and participate  
21 in the national nominating conventions of their respective political parties.

22 ***FACTUAL BACKGROUND***

23 This request is made on behalf of Bill Bradley for President, Inc. ("the Bradley  
24 Committee") and McCain 2000, Inc. ("the McCain Committee"), the principal campaign  
25 committees of Mr. Bradley and Mr. McCain, respectively.

26 Mr. Bradley and Mr. McCain each sought the nominations of the Democratic  
27 Party and Republican Party, respectively, for President of the United States in 2000. Each  
28 has qualified for and received Federal matching funds. On March 9, 2000, each  
29 separately made a public statement indicating that he would not compete in any other  
30 primaries and caucuses. The Commission thereafter concluded that neither candidate was

1 actively seeking nomination for election in more than one State, as provided for in 11  
2 CFR 9033.5. Since then, each candidate's campaign has consistently filed statements  
3 with the Commission showing net outstanding campaign obligations.<sup>1</sup> In the course of  
4 their campaigns, Mr. Bradley earned 419 delegates and Mr. McCain earned 250  
5 delegates.<sup>2</sup>

6 You state that neither former candidate has "released" his delegates. You affirm  
7 that each has preserved the opportunity for a distinctive voice at the convention, and full  
8 participation in convention activities. You explain that both candidates will maintain  
9 contact with and receive continued support from those delegates through the summer  
10 nomination conventions, and will be otherwise active at these conventions, as described  
11 below. The convention activities important to the candidates and their delegates include:

- 12 1. Travel to and from the convention.
- 13
- 14 2. Meetings with delegates and supporters in various state delegations, to thank them for  
15 their support and encourage them to remain active on the issues that initially  
16 motivated their support.
- 17
- 18 3. Attendance at receptions hosted by their campaigns, at which they would have the  
19 opportunity to thank their delegates, supporters and staffs, and maintain dialogue and  
20 debate with them about the direction of their party on important issues.
- 21
- 22 4. Attendance at fundraising events for their campaigns, in order to retire primary  
23 election debts.
- 24
- 25 5. Participation in the official proceedings of the conventions in various ways, including  
26 speeches.

---

<sup>1</sup> The Commission notes that taking together the most recent Statement of Net Outstanding Campaign Obligations filed by each campaign, with the most recent matching fund disbursements to each, the Bradley Committee has net outstanding obligations of \$306,567 (of which the Bradley Committee estimates \$50,000 is convention related expense), while the McCain Committee has net outstanding obligations of \$690,427 (of which \$430,000 is estimated by the McCain Committee to be convention related expense).

<sup>2</sup> In a phone conversation with counsel for Mr. McCain and Mr. Bradley, it was confirmed that neither of them are delegates to the nominating conventions. It was further indicated that none of the staff personnel or volunteers considered in this request are convention delegates.

1  
2       You propose that each committee would pay for staff and volunteers to prepare  
3 for and attend the convention, to the extent that their presence is necessary to support the  
4 candidates in these activities. You state that the committees request that the Commission  
5 interpret the Matching Act, 26 U.S.C. §9031 *et seq.*, to allow them to pay costs relating to  
6 their convention activities, or alternatively, to approve other means of lawful payment of  
7 the described expenses. An alternative method you suggest is to have such expenses paid  
8 by "other registered Federal political committees" and treat them as "operating expenses  
9 of the non-Presidential committee." You contend that these payments should not be  
10 contributions since "they would not be on behalf of a candidate for Federal office."

11 ***ACT AND COMMISSION REGULATIONS***  
12

13       Under the Matching Act and Commission regulations, all contributions received  
14 by an individual from the date he becomes a candidate and all Federal matching payments  
15 received by the candidate shall be used only to defray qualified campaign expenses or to  
16 repay loans or otherwise restore funds (other than contributions which were received and  
17 expended to defray qualified campaign expenses) which were used to defray qualified  
18 campaign expenses. 26 U.S.C §§9032(9), 9042(b); 11 CFR 9034.4(a)(1).

19       If on the date of ineligibility a candidate has net outstanding campaign  
20 obligations, that candidate may continue to receive matching payments provided that on  
21 the date of payment there are remaining net outstanding campaign obligations. 11 CFR  
22 9034.1(b). The candidate's net outstanding campaign obligations equal the difference  
23 between the total of all outstanding obligations for qualified campaign expenses as of the  
24 candidate's date of ineligibility, plus estimated necessary winding down costs, less the

total of cash on hand, capital assets, other assets and receivables. 11 CFR 9034.5(a).

The amount submitted as the total of outstanding campaign obligations shall not include any accounts payable for non-qualified campaign expenses. 11 CFR 9034.5(b)(1). A qualified campaign expense is a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value incurred by a candidate or his authorized committee in connection with his campaign for nomination for election, the incurring of which does not constitute a violation of the law. 26 U.S.C. §9032(9).

In addition to the costs to defray the candidates net outstanding campaign obligations, qualified campaign expenses also include "winding down" costs. 11 CFR 9034.4(a)(3). These are associated with the termination of political activity, such as the costs of complying with the post election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies. Such costs are considered qualified campaign expenses. A candidate may receive and use matching funds for these purposes either after the candidate has notified the Commission in writing of withdrawal from the campaign for nomination, or after the date of the party's nominating convention, if has not withdrawn before the convention. 11 CFR 9034.4(a)(3)(i).

Qualified expenses can also include gifts and monetary bonuses provided that gifts for committee employees, consultants and volunteers, in recognition for campaign-related activities or services, do not exceed \$150 total per individual and the total of all gifts does not exceed \$20,000. 11 CFR 9034.4(a)(5)(i). In the case of monetary bonuses for committee employees and consultants in recognition for campaign-related activities or services, the regulations require that they be awarded pursuant to a written contract made

1 prior to the date of ineligibility and be paid no later than thirty days after the date of  
2 ineligibility. 11 CFR 9034.4(a)(5)(ii).

3 Under the Act and Commission regulations, a candidate and the candidate's  
4 committee have wide discretion in making expenditures to influence the candidate's  
5 election, but may not convert campaign funds to the personal use of the candidate or any  
6 other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d);

7 Commission regulations provide guidance regarding what would be considered  
8 personal use of campaign funds. Personal use is defined as "any use of funds in a  
9 campaign account of a present or former candidate to fulfill a commitment, obligation or  
10 expense of any person that would exist irrespective of the candidate's campaign or duties  
11 as a Federal officeholder." 11 CFR 113.1(g), see Advisory Opinions 2000-02 and 1996-  
12 34. Under 11 CFR 113.2(a)(2), excess campaign funds may be used to pay any ordinary  
13 and necessary expenses incurred in connection with one's duties as a holder of Federal  
14 office. Commission regulations list a number of purposes that would constitute personal  
15 use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use, the  
16 Commission makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).  
17 Travel expenses, including subsistence expenses incurred during travel, are among those  
18 expenses to be analyzed on a case-by-case basis. If such travel involves both personal  
19 activities and campaign or officeholder related activities, the incremental expenses that  
20 result from personal activities are personal use, unless the person benefiting reimburses  
21 the campaign within thirty days for the amount of those expenses. 11 CFR  
22 113.1(g)(1)(ii)(C).

**APPLICATION TO PROPOSAL**

***Commission policy in previous Presidential primary campaign audits***

The Commission has generally concluded in its audits of past Presidential primary campaigns that national nominating convention expenses are non-qualified campaign expenses since they do not relate to seeking the nomination when the candidate has withdrawn from the election. See 26 U.S.C. §9032(9). In the 1984 presidential cycle, the Commission determined that Friends of George McGovern made non-qualified campaign expenses when it incurred expenditures related to "preparatory [staff] work" for the Democratic National Convention. Final Audit Report for Friends of George McGovern, approved February 6, 1985, p. 5-6; see also, Addendum to Final Audit Report for Friends of George McGovern, approved February 19, 1986, p. 5-7. In that same cycle, the Commission determined that Hollings for President, Inc., should make a repayment for incurring non-qualified campaign expenses related to convention hotel and airline ticket purchases. Final Audit Report for Hollings for President, Inc., approved February 19, 1986, p. 6-7. A similar repayment determination for convention-related, non-qualified campaign expenses was issued in the 1988 presidential election cycle for the Albert Gore, Jr. for President Committee, Inc. Final Audit Report for Albert Gore, Jr. for President Committee, Inc., approved July 13, 1989, p. 10-12. In more recent audits, the Commission reaffirmed that convention expenses are non-qualified expenses.

In the audit of Americans for Robertson, Inc., the Commission concluded that convention expenses made in an effort "to assist fundraising and debt retirement efforts" and to "maintain support and enthusiasm of delegates elected on behalf of Dr. Robertson" were non-qualified campaign expenses. Statement of Reasons for Americans for

Robertson, approved September 23, 1993, p. 35-38.<sup>3</sup> The Robertson determination was upheld by the Circuit Court of Appeals for the D.C. Circuit. *Robertson v. FEC*, 45 F.3d 486, 492 (D.C. Cir. 1995).<sup>4</sup> These are the past precedents the Commission considers when reviewing your specific convention expenses.<sup>5</sup>

#### *Use of Federal funds for specific expenses*

##### *Convention travel*

As noted above, the Commission has in past audit matters specifically determined that the expenses necessary to travel to and attend a Presidential nominating convention are non-qualified expenses for candidates who are no longer seeking the party's nomination, which is the case with Mr. Bradley and Mr. McCain. Therefore, in general, neither committee may use committee or Federal funds to pay for the convention travel expenses of the candidate or their staff and volunteers. However, there are certain

---

<sup>3</sup> See also the Final Audit Report for the Tsongas Committee, Inc., approved December 16, 1994, p. 63 which is not inconsistent with other audits on the issue of expenses by an inactive candidate to attend the nominating convention. The Report notes the view of the Tsongas committee that while "valid arguments exist that such disbursements are qualified campaign expenses, the [Tsongas] Committee recognizes that the Commission previously has rejected these arguments in the context of other audits." *Id.*

<sup>4</sup> Additionally, the Commission's Explanation and Justification for its regulations cites convention expenses as an example of non-qualified campaign expenses. See Explanation and Justification, 11 CFR Parts 9007 and 9038, 50 *Fed. Reg.* 9422 (March 8, 1985) (discussing convention-related expenses as an example of non-qualified campaign expenses in the context of repayment calculations).

<sup>5</sup> Your request cites the final audit report on Paul Simon for President as supporting the possible use of Federal funds to pay fundraising expenses at a national convention for a candidate that was no longer actively seeking his party's nomination. The Commission notes that the Simon audit is consistent with other audits on this point. In the Audit Report, the Simon Committee had been asked as an initial matter to produce documentation substantiating its claim that the convention expenses at issue were fundraising expenses. The Simon Committee failed to produce the documentation, and the related expenses were included in amount which the Commission determined the campaign was obligated to repay to the Treasury. See Final Audit for Simon for President, approved August 29, 1991, p. 4-9. However, on an unrelated procedural issue, the U.S. Court of Appeals for the DC Circuit later reversed the Commission's determinations and canceled the Committee's repayment obligations. See *Simon v. FEC*, No. 93-1252 (D.C. Cir. , May 5, 1995).

specific situations among the expenses and activities you propose that would permit the use of such funds for the described expenses.<sup>6</sup>

*Meetings and receptions to thank delegates<sup>7</sup>*

The Commission notes that 11 CFR 9034.4(a)(5) specifically discusses gifts to "committee employees, consultants and volunteers" for "campaign-related activities or services." Thank you receptions and meetings would fall into this category of qualified campaign expenses. The Commission notes that the cited regulation limits the amount expended per individual to \$150, and that the total spent for such gifts cannot exceed \$20,000 for the entire campaign. 11 CFR 9034.4(a)(5). Therefore, to the extent that such meetings are restricted to attendees who served the Bradley or McCain campaigns in the capacity of a committee employee, consultant or volunteer, the expenses of such meetings and receptions may be paid with committee and Federal funds. This regulation, which is otherwise specific as to the amounts that can be paid, does not allow the payment of travel expenses to attend or organize these events. It, therefore, does not authorize the use of committee or Federal funds to pay for the travel expenses of Mr. Bradley or Mr. McCain, or their staff or other campaign personnel, to attend these events.

*Fundraising events to retire qualified primary election debts*

As noted above, as long as the Bradley and McCain committees have remaining net outstanding campaign obligations, they remain qualified to receive matching payments, even though they are no longer seeking the Presidential nominations of their

---

<sup>6</sup> The Commission assumes that the travel expenses would include transportation (e.g. airfare and taxi fare), hotel or other lodging, and per diem subsistence for the candidates and their spouses, and for the campaign staff and volunteers.

<sup>7</sup> The Commission finds no difference between expenses for delegate meetings and receptions, as outlined in your request, and so considers them together.

1    respective parties. Fundraising expenses to retire these campaign obligations are  
2    qualified campaign expenses and may be paid from Federal funds. The Commission  
3    concludes that these expenses may be incurred with regard to fundraising events  
4    conducted by the Bradley and McCain committees and held at the respective nominating  
5    conventions. Further, because fundraising activity denotes a broader area of activity for  
6    political campaigns than the specific regulations concerning gift and bonus events to  
7    thank delegates, Mr. Bradley and Mr. McCain may use committee and Federal funds to  
8    pay their travel expenses to attend the specific fundraising events that are held at the  
9    convention. Federal and committee funds may also be used to pay the travel expenses of  
10   campaign staff who participate in the organizing and administration of the fundraising  
11   events.<sup>8</sup>

12        There are, however, several limitations which must be emphasized. First, Federal  
13   or committee funds may not be used to pay expenses allocable to the portion of their  
14   attendance for any other part of the convention.<sup>9</sup> Second, these expenses must be for  
15   specific fundraising events held at the convention itself, such as fundraising receptions  
16   and fundraising dinners. For example, Federal or committee funds may not be used to  
17   pay for expenses associated with the attendance of the candidates, and their staff or

---

<sup>8</sup> As guidance for which campaign personnel may be considered event organizers, the committees may rely upon the list of individuals considered linked to a campaign as described in 11 CFR 110.6(b)(2)(i) (which delineates those persons who are not considered as conduits for contributions): an individual who is an employee or a full-time volunteer working for the candidate's authorized committee, and those who are expressly authorized by the campaign to engage in fundraising and who hold a significant position within the campaign organization.

<sup>9</sup> The Commission recognizes that this may require Mr. Bradley and Mr. McCain to allocate their travel expenses in the same manner that Federal candidates are required to allocate their travel expenses on a particular trip between those aspects that are campaign related and those that are personal and not campaign related. By analogy, see 11 CFR 113.1(g)(1)(ii)(C) and Advisory Opinion 1996-19 (Congressman attending convention as delegate must reimburse campaign for non-campaign related portion of his travel expenses).

1 delegates, at convention events solely because such participation may be featured in video  
2 productions or other promotional materials that may be used in campaign fundraising  
3 efforts after the conventions are held.<sup>10</sup> Finally, Federal and committee funds may be  
4 used for this purpose only to the extent that at the time of the convention, the Bradley and  
5 McCain committees have outstanding net obligations. If it is determined, either prior to  
6 the convention or subsequent to the convention, that at the time of the convention itself  
7 the financial situation of either committee was such that there were no outstanding net  
8 obligations, then any funds expended for the fundraising purposes described above  
9 become non-qualified expenses. Neither committee would be permitted to use Federal or  
10 committee funds for these purposes and Federal funds already used for these purposes  
11 would have to be repaid. *See* 26 U.S.C. §9038(b)(2), 11 CFR 9034.4(a)(1) and  
12 9038.2(b)(2)(A).<sup>11</sup>

---

<sup>10</sup> The described activities must be performed in a manner distinguishable from that of Americans for Robertson, Inc. As noted above, the Commission rejected a claim by the Robertson committee that it be permitted to use matching funds for convention expenses at the 1988 Republican National Convention after he was no longer eligible for public funds. Robertson Audit at 486. The Circuit Court of Appeals for the DC Circuit in reviewing the audit determination and the Robertson committee's claims noted that the committee:

spent \$74,482.01 of which the Commission has now ordered a repayment to the Treasury of \$22,727.59 in order to attend and portray his attendance at the 1988 Republican National Convention, which occurred well after petitioner's eligibility for receipt of public funds had ended. Petitioner claimed that the video and audio record of Robertson's attendance at the convention was utilized as part of a mass mailing to raise funds to retire campaign debts, which should be thought a paradigmatic "winding down" expense. The Commission had previously reasonably rejected the notion that attendance of a party's convention was a legitimate winding down expense, see *Repayments by Publicly Financed Presidential Candidates*, 50 *Fed. Reg.* 9,422-23 (March 8, 1985); the making of a video of that event for fundraising purposes understandably did not alter the Commission's conclusion. Under petitioner's theory, a candidate's trip to Hawaii would be a legitimate winding down expense if videos from the trip were used at fundraising gatherings. *Robertson*, at 492.

<sup>11</sup> Under 11 CFR 9033.11 both Presidential campaign committees are obligated to provide documentation indicating that each disbursement is a qualified campaign expense. As regards possible fundraising expenses at the nominating conventions, both committees should provide, at the time each campaign is audited, documentation that directly links each expense to a specific, discrete fundraising event. For example, they should document and describe the role of each individual campaign staffer or volunteer working for the event and should provide copies of the solicitation materials used in promoting the event (i.e., invitations), as well as any solicitation materials used at the event itself.

1        *Participation in official convention events*

2  
3        Unlike the expenses related to holding fundraising events and events organized to  
4        thank delegates who are committee employees, consultants or volunteers, expenses  
5        related to participation in the official convention proceedings would have no relationship  
6        to winding down expenses. They also do not fall into any other category of qualified  
7        campaign expenses, as noted in the preceding discussion. Therefore, Federal and  
8        committee funds may not be used by the Bradley and McCain Committees to cover  
9        expenses specifically related to participating in the official proceedings of the national  
10        conventions.

11       *Availability of other funds for convention expenses*

12        You ask what other sources of alternative funding may be allowed to pay the  
13        expenses described in your request. One method or source you apparently suggest is to  
14        accept donations, either directly or indirectly, from "a non-Presidential Federal  
15        committee" which should, you contend, be regarded as "operating expenses" of such a  
16        committee. The Commission can provide only a partial response to this inquiry because  
17        you have not provided a complete description of the material and relevant facts. See 11  
18        CFR 112.1(c). In this limited response, the Commission must also address each of the  
19        candidates separately since each has a different status under the Act and Commission  
20        regulations.

21       *Senator McCain*

22        While Mr. McCain has ended his campaign for his party's Presidential  
23        nomination, he is still a Federal candidate for election to the U.S. Senate.<sup>12</sup> In Advisory

---

<sup>12</sup> According to reports filed with the Commission by Mr. McCain's Senate campaign committee, McCain

1 Opinion 1996-34, the Commission considered the situation of a Federal candidate and  
2 also a Member of Congress who, though not a delegate, wished to attend his party's  
3 national convention. The Commission considered that the candidate would be involved  
4 in events which included major donors to his campaign and would otherwise be engaging  
5 in fundraising activity related to his Congressional campaign. The Commission also  
6 noted that, as a Member of Congress, the candidate would meet with constituents to  
7 discuss issues of importance to his district. *See* Advisory Opinion 1996-34.

8         Considering these circumstances, the Commission concluded that the use of his  
9 campaign funds would not constitute personal use since the candidate would be involved  
10 in campaign related or office holder related activities. If Senator McCain plans to engage  
11 in similar activity at the convention, he could use funds from his Senate committee to pay  
12 for his convention expenses. Campaign funds could also be used to pay for the expenses  
13 of campaign staff members and volunteers necessary to conduct these activities. *See*  
14 Advisory Opinion 1996-20. Contributions, subject to the limitations and prohibitions of  
15 the Act, may be made to his Senate campaign to pay for these expenses.

1        *Mr. Bradley*

2        Mr. Bradley's position differs significantly from that of Mr. McCain. Like Mr.  
3        McCain, Mr. Bradley is no longer actively seeking his party's Presidential nomination  
4        and is not himself a delegate. However, unlike McCain, Mr. Bradley is neither a  
5        candidate for another Federal office nor is he a current Member of Congress. While Mr.  
6        Bradley has a Presidential campaign committee that will continue to raise funds to retire  
7        outstanding net debt, he is not an active candidate. In these specific circumstances, the  
8        Commission concludes Mr. Bradley may personally accept gifts from individuals to pay  
9        for his travel to and attendance at the Democratic convention without these gifts being  
10       considered as contributions under the Act.

11       The Commission cautions, however, that 2 U.S.C. §439a and 11 CFR 113.1(g)  
12       prohibit the conversion of campaign funds for the personal use of the candidate *or any*  
13       *person*. This prohibition would therefore apply should the campaign committee of a  
14       Federal candidate provide funds to Mr. Bradley or his campaign staff to attend the  
15       Democratic convention. However, the personal use prohibitions do not apply to the use  
16       of funds by Federal political committees that are not authorized candidate campaign  
17       committees. See Advisory Opinion 1991-21. These unauthorized political committees  
18       could provide funds to Mr. Bradley and his staff to attend the national convention.<sup>13</sup>

19       The Commission expresses no opinion regarding application of any rules of the  
20       U.S. Senate or the Ethics in Government Act to the described activities, because these

---

<sup>13</sup> Commission records indicate that Mr. Bradley has formed a non-connected political committee, Time Future Inc., which originally was his former Senate campaign committee, Bill Bradley for U.S. Senate. The Commission notes that the personal use restrictions would attach to any funds in Time Future Inc., that remained from his former Senate campaign committee. See 11 CFR 113.2(e)(5) and Advisory Opinions 1994-37 and 1993-22.

1 issues are not within its jurisdiction. For the same reason, the Commission does not  
2 express any views as to any Federal or other tax ramifications.

3 This response constitutes an advisory opinion concerning the application of the  
4 Act, the Matching Act, or the regulations prescribed by the Commission, to the specific  
5 transaction or activity set forth in your request. See 2 U.S.C. §437f.

6 Sincerely,

7  
8  
9 Darryl R. Wold  
10 Chairman

11  
12 Enclosures (AOs 2000-02, 1996-34, 1996-20, 1996-19, 1994-37, 1993-22, and 1991-21)

